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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. ~~75~~-95

STATE OF TENNESSEE; WINFIELD DUNN, as Governor of the State of Tennessee and Commander-in-Chief of the National Guard of the State of Tennessee; TENNESSEE AIR NATIONAL GUARD; TENNESSEE AIR NATIONAL GUARD, 134th Air Refueling Group (TAC); MAJOR GENERAL WILLIAM C. SMITH, as Adjutant General of the National Guard of the State of Tennessee; COLONEL ROBERT W. AKIN, as Commander of the 134th Air Refueling Group; LIEUTENANT COLONEL DAVID L. CARTER, as Commander of the 134th Combat Support Squadron; LIEUTENANT COLONEL BOB ARR, as Commander of the 151st Air Refueling Squadron; LIEUTENANT COLONEL WILLIAM D. ASBURY, as Commander of the 134th Supply Squadron; LIEUTENANT COLONEL THOMAS P. WEBB, III, as Commander of the 134th Camron Squadron; and LIEUTENANT COLONEL MARSHALL C. PIERCE, as 134th Director of Operations,
Petitioners,

v.

BILLY DON DUNLAP,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Sixth Circuit

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IN THE

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OCTOBER TERM, 1974

No. _____

STATE OF TENNESSEE; WINFIELD DUNN, as Governor of the State of Tennessee and Commander-in-Chief of the National Guard of the State of Tennessee; TENNESSEE AIR NATIONAL GUARD; TENNESSEE AIR NATIONAL GUARD, 134th Air Refueling Group (TAC); MAJOR GENERAL WILLIAM C. SMITH, as Adjutant General of the National Guard of the State of Tennessee; COLONEL ROBERT W. AKIN, as Commander of the 134th Air Refueling Group; LIEUTENANT COLONEL DAVID L. CARTER, as Commander of the 134th Combat Support Squadron; LIEUTENANT COLONEL BOB ARR, as Commander of the 151st Air Refueling Squadron; LIEUTENANT COLONEL WILLIAM D. ASBURY, as Commander of the 134th Supply Squadron; LIEUTENANT COLONEL THOMAS P. WEBB, III, as Commander of the 134th Camron Squadron; and LIEUTENANT COLONEL MARSHALL C. PIERCE, as 134th Director of Operations,
Petitioners,

v.

BILLY DON DUNLAP,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Sixth Circuit

The petitioner respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit in the instant case.

OPINIONS BELOW

The opinion of the Court of Appeals is reproduced as Appendix A to this petition. The memorandum opinion of the United States District Court for the Eastern District of Tennessee is reproduced as Appendix B to this petition.

JURISDICTION

The judgment of the Court of Appeals was entered on April 17, 1975. This petition for certiorari is timely filed within ninety (90) days of that date. The jurisdiction of this Court rests upon 28 U.S.C. § 1254(1).

QUESTION PRESENTED

The single issue presented for determination is whether or not a federal court may review a military commander's decision to deny a request for re-enlistment.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitutional Provisions:

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> ". . . [N]or shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Statutory Provisions:

32 U.S.C. § 709(a) (Supp. 1974), provides:

> "Under regulations prescribed by the Secretary of the Army or the Secretary of the Air Force, as the case may be, and subject to subsection (b) of this section persons may be employed as technicians in (1) the administration and training of the National Guard; and (2) the maintenance and repair of supplies issued to the National Guard of the armed forces.

32 U.S.C. § 709(b) (Supp. 1974) provides:

> Except as prescribed by the Secretary concerned, a technician employed under subsection (2) shall, while so employed, be a member of the National Guard and hold the military grade specified by the Secretary concerned for that position.

32 U.S.C. § 709(e)(1) (Supp. 1974) provides:

> Notwithstanding any other provision of law and under regulations prescribed by the Secretary concerned: (1) a technician who is employed in a position in which National Guard membership is required as a condition of employment and who is separated from the National Guard or ceases to hold the military grade specified for his position by the Secretary concerned shall be promptly separated from his technician employment by the adjutant general of the jurisdiction concerned.

32 U.S.C. § 709(e)(6) (Supp. 1974) provides:

> (6) a technician shall be notified in writing of the termination of his employment as a technician and such notification shall be given at least thirty days prior to the termination date of such employment.

32 U.S.C. § 709(e)(5) (Supp. 1974) provides:

> (5) a right of appeal which may exist with respect to clause (1), (2), (3), or (4) shall not extend beyond the adjutant general of the jurisdiction concerned."

STATEMENT OF THE CASE

On January 11, 1974, the respondent, Billy Don Dunlap, filed a complaint against certain officers in the Tennessee Air National Guard, certain units of the Tennessee Air National Guard, the Governor of Tennessee, and the State of Tennessee. (Appendix D) The complaint asserted that it was founded upon the Due Process and Equal Protection Clauses of the Fourteenth Amendment of the Constitution of the United States and upon 42 U.S.C. §§ 1983, 1985(3), and 1986. The complaint also sought a judgment to declare that a commander's prerogative in respect to re-enlistment of enlisted personnel in the Tennessee Air National Guard to be unconstitutional and also sought injunctive relief to prohibit the commander of the respondent from exercising that prerogative. Basically, the respondent sought to adjudicate the fact that his commander had determined that it was not in the best interests of the Tennessee Air National Guard to allow him to re-enlist at the termination of his current period of enlistment. (On December 8, 1972, the last day in his enlistment period, the respondent had been issued orders discharging him from the Tennessee Air National Guard.)

In addition to being a member of the Tennessee Air National Guard, the respondent had been employed as a Civil Service technician. His employment was not unlike that involved in the case of *Baum v. Zuckert*, 342 F.2d 145 (6th Cir. 1955), concerning the Air Force Reserve Technician Program, in which that Court noted that the program was to provide active Air Force Reserve units:

> ". . . which are composed chiefly of personnel who train only a few days each month and two weeks in the summer, with a core of highly trained personnel whose full-time civilian jobs coincide with their military job." At page 146.

After the termination of his enlistment, the respondent was notified that his employment as a Civil Service technician would be terminated thirty days from the date of notification as he no longer met a condition of his employment; that is, maintaining his status as an active member of the Tennessee Air National Guard.

The respondent initiated the present action one year less a day from the termination of his Civil Service technician employment. The petitioners responded by filing a motion to dismiss and alternative motion for summary judgment (Appendix C) to which the respondent filed a response.

The United States District Court for the Eastern District of Tennessee, Northern Division, Robert L. Taylor, Judge, granted the petitioners' motion to dismiss with an accompanying memorandum opinion. The respondent perfected an appeal from that decision and on April 17, 1975 the United States Court of Appeals for the Sixth Circuit reversed and remanded the lower court holding that ". . . decisions which are made for non-military reasons involving no application of military expertise may well be outside the boundaries of the doctrine of nonreviewability." Appendix A, page A-5.

From this decision, the petitioners now seek review by way of a writ of certiorari from this Honorable Court.

REASON FOR GRANTING THE WRIT

The decision of the Court of Appeals has departed from the accepted and usual judicial standard for review of military decisions and has apparently adopted a standard which, if adopted, would affect the complete military establishment and thus should only be adopted by this Honorable Court. Further, if the decision of the Sixth Circuit is allowed to stand, it would result in the potential for the review of every military decision at least to the extent that the threshold question of whether or not the decision was indeed a military decision would have to be litigated. If the decision were glossed so to apply it only to military decisions which might affect Civil Service Technicians' employment, it would create an unwieldy bifuracted system of judicial review of military decisions which could conceivably wreck havoc in the Reserve and National Guard military components.

ARGUMENT

As noted above, the respondent's employment was not unlike that involved in the case of *Baum v. Zuckert*. That is, in order to maintain his position as a Civil Service technician, he was required to maintain his position as an enlisted man with the Tennessee Air National Guard. When the respondent ceased to hold a position in the Guard, he was notified that his employment as a technician would be terminated pursuant to the provisions of 32 U.S.C. §709(e)(1) (Supp. 1974), which, *inter alia*, provides that a technician who is separated from the Guard ". . . shall be promptly separated from his technician employment by the Adjutant General of the jurisdiction concerned."

As the district court in the instant case aptly noted, the principal allegation of the respondent was that the discretion vested in his commanding officer to deny re-enlistment is *ipso*

facto exercised in an arbitrary and capricious manner, since the discretion is not particularly delineated. This allegation in itself would indicate that the decision was a military one within the discretion of the commander.

There is no allegation in the respondent's complaint that the military failed to follow its own regulations. Where military officials have violated military regulations, courts have not been reluctant to review such actions. *Schatten v. United States*, 419 F.2d 187 (6th Cir. 1969); *Smith v. Resor*, 406 F.2d 141 (2d Cir. 1969); *Van Bourg v. Nitze*, 388 F.2d 577 (D.C. Cir. 1967); *Bluth v. Laird*, 435 F.2d 1065 (4th Cir. 1970); *Noyd v. McNamara*, 378 F.2d 538 (10th Cir. 1967), *cert. denied*, 389 U.S. 1022, 88 S.Ct. 593, 19 L.Ed. 667. There is no right to re-enlist in the armed services under the particular circumstances presented here. See *O'Callahan v. United States*, 451 F.2d 1390 (Ct. Cl. 1971); *Davis v. United States*, 196 Ct. Cl. 517 (1971), *cert. denied*, 405 U.S. 1046, 92 S.Ct. 1313, 31 L.Ed. 2d 589 (1972). In *Harmon v. Brucker*, 355 U.S. 579, 78 S.Ct. 433, 2 L.Ed. 2d 503 (1958), it was decided that a review of military matters could be made in order to determine whether or not a decision by military authorities was made within the scope of statutory and regulatory authority. Here, there was no allegation that the decision was made outside the scope of military authority.

In *Mindes v. Seaman*, 453 F.2d 197 (5th Cir. 1971), the Court briefly reviewed the history of judicial review of military decisions. In *Reaves v. Ainsworth*, 219 U.S. 296, 31 S.Ct. 230, 55 L.Ed. 225 (1911), this Court declined to grant judicial review to an allegation that the decision of an Army medical board was arbitrary and capricious. Apparently, such review would have entailed, *inter alia*, a determination of the plaintiff's fitness as an officer. As mentioned above, courts have granted judicial review in cases where it was alleged that the military did not obey its own regulations. Courts have also granted review to claims of unconstitutionality of statutes, ex-

ecutive orders, and regulations. See *Morse v. Boswell*, 289 F. Supp. 812 (D.C. Md. 1968), affirmed in 401 F.2d 544, *cert. denied* 393 U.S. 1052, 89 S.Ct. 687, 27 L.Ed. 2d 694 (1969); *Goldstein v. Clifford*, 290 F. Supp. 275 (D.C.N.J. 1968); *United States v. Flower*, 452 F.2d 80 (5th Cir. 1971). Courts have indicated their authority to review the discretion of post commanders in restricting the distribution of printed materials. See *Dash v. Commanding General, Ft. Jackson, South Carolina*, 307 F. Supp. 849 (D.C.S.C. 1969), affirmed [*Yahr v. Resor*], 431 F.2d 690 (4th Cir. 1970), *cert. denied* [*Dash v. Commanding General, Ft. Jackson, South Carolina*], 401 U.S. 981, 91 S.Ct. 1192, 28 L.Ed.2d 333 (1970). The Second and Seventh Circuits have declined review in haircut cases. *Anderson v. Laird*, 437 F.2d 912 (7th Cir. 1971); *Raderman v. Kaine*, 411 F.2d 1102 (2nd Cir. 1969). The Fifth Circuit appeared to reach the merits of a haircut regulation in *Doyle v. Koelbl*, 434 F.2d 1014 (5th Cir. 1970), although a dismissal was affirmed for failure to exhaust military administrative remedies. In *Arnheiter v. Chafee*, 435 F.2d 691 (9th Cir. 1970), the Court refused to review the question of why an officer was relieved of command of his ship. In *Cortright v. Resor*, 447 F. 2d 245 (2nd Cir. 1971), the transfer of a serviceman was not reviewed even though it was alleged to have been made because of protected First Amendment activities. Court-martial convictions have traditionally been held subject to collateral habeas corpus review. Collateral effects of court-martial convictions have been held to be subject to review. See *Ashe v. McNamara*, 355 F.2d 277 (1st Cir. 1965); *Smith v. McNamara*, 395 F.2d 896 (10th Cir. 1968); *Angle v. Laird*, 429 F.2d 892 (10th Cir. 1970).

The allegations in the instant case meet none of the previous criteria established for judicial review of military decisions. The determination of the Court of Appeals for the Sixth Circuit that Courts should determine the threshold question of whether or not a decision is a military decision in each case is a substantial departure from the aforementioned criteria for judicial review.

A doctor who was drafted because of his medical expertise sued to have the Army ordered to utilize him in a medical position and to award him a commission. The doctor had claimed the Fifth Amendment privilege when questioned concerning his membership in certain "subversive" organizations. The government's position in both the district court and Court of Appeals was that the doctor, although drafted into the military because of his medical expertise, could be utilized in any position that his commanders saw fit. Both the lower courts agreed with the government's position. However, when the case reached this Honorable Court, the government agreed that the statutes required the doctor to be used in a medical capacity, but argued that he was not entitled to a commission and that he could be assigned to any particular duties within the medical field. This Court agreed and stated that it would not review assignments since these were peculiarly in the realm of military discretion. *Orloff v. Willoughby*, 345 U.S. 83, 73 S.Ct. 534, 97 L.Ed. 842 (1953).

The only colorable claim in the respondent's complaint was that the determination of his commander that he should not be allowed to re-enlist was a sham to deny him employment in his Civil Service Technician capacity without any opportunity for administrative review from his dismissal as a Civil Service Technician which followed automatically. 32 U.S.C. § 709(e)(1) (Supp. 1974) In *Boling v. Rockefeller*, 277 N.Y.S.2d 168 (1967), certain individuals were discharged prior to the termination of their current periods of enlistment. The State court, though utilizing criteria for judicial restraint different than those in the instant case, stated that the fact that the discharge carried with it the concomitant loss of a civilian position did not clothe the courts with any greater authority over the subject matter. The petitioners insist that that determination is applicable in the instant situation.

The United States Court of Appeals for the Fifth Circuit has surveyed the extent of judicial review of military decisions and set forth certain guidelines to be utilized in determining whether judicial review was appropriate. *Mindes v. Seaman*, 453 F.2d 197 (5th Cir. 1971). Two primary prerequisites were indicated: the first being an allegation of the deprivation of a constitutional right or an allegation that the military did not follow the controlling statutes and regulations; the second being an exhaustion of military administrative remedies. At page 201. In the instant case, the plaintiff asserts the deprivation of a constitutional right. However, the Fifth Circuit aptly noted that even where there was an allegation of a deprivation of a constitutional right, judicial review would not be automatic without the weighing of certain additional factors.

The first matter is the nature and strength of the challenge to the military determination. In the instant case, the only challenge to the military determination was a general challenge to the discretionary powers vested in a commanding officer to determine what is in the best interests of the Tennessee Air National Guard. The respondent did not attack the decision of the military commander as it effected a traditional military purpose. The attack was founded on the idea that the discretion vested in a commander was so broad as to render any exercise of that discretion to be arbitrary and capricious. The second factor to be weighed is the potential injury to a plaintiff if judicial review is denied. In the instant case, the respondent alleged absolutely no injury in regard to his duties in the Tennessee Air National Guard.*

The Fifth Circuit also noted that a Court should consider the effect which judicial review would have upon the military

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* The respondent asserted for the first time in his brief in the Court of Appeals that he had accrued approximately seventeen and one-half years of creditable service toward retirement and had a reasonable expectation that he would be allowed to re-enlist and complete two and one-half additional years so that his retirement entitlements could be vested.

function and the extent to which military expertise and discretion is involved in the determination. It is this particular matter which is the crux of the prayer for certiorari in the instant case. Basically, the Sixth Circuit held that courts must make a preliminary determination in each case seeking judicial review of a military decision. That determination would be whether or not the decision was a military decision or merely made by a military decision-maker. Should this view prevail, the petitioners envision a potential for great abuse of the judicial system by disgruntled servicemen who may seek judicial review of any decision made by a military superior. A Court would then have to determine the threshold question of whether or not the decision was a military decision for a military purpose. This, of course, could result in the litigation of the merits of the claim itself; the military could conceivably be forced to defend each of its decisions, at least to the extent of proving that the decision was made for a military purpose, rather than for a "secular" one.

The petitioners would respectfully submit that the decision of whether to allow an enlisted member of the Armed Services to re-enlist is a peculiarly military decision. In reaching such a determination, a commander must determine that the person had a particular military occupational specialty that would be necessary for the completion of the mission of his unit. He would of necessity have to consider the qualifications of the applicant for enlistment or re-enlistment along with the qualifications of other persons whose records indicate experience and expertise in that particular military occupational specialty. Further, a military commander must take into consideration the effect that the enlistment or re-enlistment of a particular individual would have on the morale and efficiency of his unit. None of these generally described determinations lend themselves readily to judicial review and all are peculiarly within the realm of a commander's military discretion.

As this Honorable Court noted in *Orloff v. Willoughby, supra*:

> "We know that from top to bottom of the Army the complaint is often made, and sometimes with justification, that there is discrimination, favoritism or other objectionable handling of men. But judges are not given the task of running the Army. The responsibility for setting up channels through which such grievances can be considered and fairly settled rests upon the Congress and upon the President of the United States and his subordinates. The military constitutes a specialized community governed by a separate discipline from that of the civilian. Orderly government requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as the Army must be scrupulous not to intervene in judicial matters." At pages 93-94.

CONCLUSION

For the foregoing reasons, the petitioners respectfully pray that the writ of certiorari issue to the United States Court of Appeals for the Sixth Circuit so that this Court might review the decision of the Court of Appeals.

Respectfully submitted

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APPENDIX

APPENDIX A

No. 74-1566

United States Court of Appeals
For the Sixth Circuit

Billy Don Dunlap,
Plaintiff-Appellant,
v.
State of Tennessee, et al.,
Defendants-Appellees.

On Appeal from the United States District Court for the Eastern District of Tennessee

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Decided and Filed April 17, 1975

Before: Edwards, Circuit Judge; Peck, Circuit Judge; *Duncan, District Judge.

Duncan, District Judge. This is an appeal from an order of the District Court dismissing plaintiff's complaint for injunctive, declaratory and pecuniary relief for defendants' alleged violation of plaintiff's rights under the Fourteenth Amendment to the United States Constitution. The complaint was brought by Billy Don Dunlap against various officials associated with the Tennessee Air National Guard. The District Court held that this case, involving as it does a decision by the military, does not raise questions which may properly be reviewed by a civil court.

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* The Honorable Robert M. Duncan, Judge, United States District Court for the Southern District of Ohio, sitting by designation.

Prior to the events which led to his filing this 42 U.S.C. § 1983 action in the District Court, appellant had a dual relationship with the Tennessee National Guard. He was employed by the National Guard as a technician pursuant to the Technicians Statute, 32 U.S.C.A. § 709 (Supp. 1974). National Guard technicians are charged with the administration and training of National Guard personnel and with the maintenance and repair of Guard supplies.[1] Appellant was also a member of the Tennessee Air National Guard. His membership in the Guard was a statutory prerequisite to his continued employment as a technician.[2] Knowing that his term of enlistment as a member of the Guard would expire on December 8, 1972, appellant sought re-enlistment through the appropriate channels.

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[1] Subsection (a) of the Technicians Statute, 32 U.S.C.A. § 709 (a) (Supp. 1974), provides:

> Under regulations prescribed by the Secretary of the Army or the Secretary of the Air Force, as the case may be, and subject to subsection (b) of this section persons may be employed as technicians in—
>
> (1) the administration and training of the National Guard; and
>
> (2) the maintenance and repair of supplies issued to the National Guard or the armed forces.

[2] 32 U.S.C.A. § 709(b) (Supp. 1974) provides:

> Except as prescribed by the Secretary concerned, a technician employed under subsection (a) shall, while so employed, be a member of the National Guard and hold the military grade specified by the Secretary concerned for that position. Section (e)(1) provides:
>
> Notwithstanding any other provision of law and under regulations prescribed by the Secretary concerned—
>
> (1) a technician who is employed in a position in which National Guard membership is required as a condition of employment and who is separated from the National Guard or ceases to hold the military grade specified for his position by the Secretary concerned shall be promptly separated from his technician employment by the adjutant general of the jurisdiction concerned.

However, he was not permitted to re-enlist. The complaint alleges that he was informed by his commanding officer, Colonel Robert W. Akin, that Akin in the exercise of his discretion had decided that it was not in the best interests of the Guard to permit his re-enlistment. Appellant persisted in his efforts and was notified that Akin had decided to convene a board of officers to advise him as to the matter of appellant's re-enlistment. Appellant requested, and was refused, a more detailed statement of the reason for Akin's decision and permission to appear before the board of officers to refute any charges which had been made against him. The board met and agreed with Colonel Akin's decision. Appellant thereby lost his Guard membership without ever learning the reason it was believed not to be in the best interests of the Guard to permit his re-enlistment. After receiving thirty days notice, as required by the Technicians Statute,[3] his employment as a technician was terminated on January 12, 1973. The sole reason given for the termination was his lack of membership in the Guard. Appellant took his statutory[4] appeal to the adjutant general. The District Court treated this appeal as having been decided adversely to appellant; this Court does the same.

Paragraph 14 of the complaint alleges that Colonel Akin's decision was

> purposeful and intentional action that was calculated to culminate in the plaintiff's discharge from his technician's job and have the further result of placing the plaintiff in

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[3] 32 U.S.C.A. § 709(e) (6) (Supp. 1974) provides:

> (6) a technician shall be notified in writing of the termination of his employment as a technician and such notification shall be given at least thirty days prior to the termination date of such employment.

[4] 32 U.S.C.A. § 709(e) (5) (Supp. 1974) provides:

> (5) a right of appeal which may exist with respect to clause (1), (2), (3), or (4) shall not extend beyond the adjutant general of the jurisdiction concerned; and

> such a position as would either frustrate or deny any opportunity for him to effectively pursue an administrative remedy.

In a similar vein, paragraph 16 alleges that the action by the board of officers was a

> continuing and further effort to eliminate the plaintiff from his position as a technician and to frustrate or deny any opportunity for him to effectively pursue an administrative remedy.

In finding that "under the circumstances described here, the actions of Colonel Akin and the advisory board and the subsequent appeal to the adjutant general are not subject to review by a civil court," the District Court relied upon the principle that

> judges are not given the task of running the Army. . . . Orderly government requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as the Army must be scrupulous not to intervene in judicial matters. . . .

Orloff v. Willoughby, 345 U.S. 83, 93 (1953). *Cf. Parker v. Levy*, 417 U.S. 733 (1974); *Mindes v. Seaman*, 453 F.2d 197 (5th Cir. 1971); *Gianatasio v. Whyte*, 426 F.2d 908 (2d Cir. 1970); *Schatten v. United States*, 419 F.2d 187 (6th Cir. 1969); *Baum v. Zuckert*, 342 F.2d 145 (6th Cir. 1955).

The primary rationale for the doctrine of nonreviewability of military decisions lies in the civil courts' "unwillingness to second-guess judgments requiring military expertise." *Mindes v. Seaman*, 453 F.2d 197, 199 (5th Cir. 1971). In determining the applicability of the doctrine in any particular case, the threshold question must necessarily concern the nature of the decision sought to be reviewed rather than merely the identity of the de-

cision-maker. In one sense, all decisions by military personnel are military in nature. But decisions which are made for non-military reasons involving no application of military expertise may well be outside the boundaries of the doctrine of non-reviewability.

There may have been a military justification for Colonel Akin's refusal to permit appellant's re-enlistment. Such a justification might, for example, relate specifically to appellant's lack of qualification for continued military service or more generally to a military decision to decrease the ranks of the Guard by limiting re-enlistments. Colonel Akin has declined appellant's requests that he state more precisely the military reason for his decision. Appellant in his complaint has filled this void by alleging that the decision was made not for military reasons but to terminate appellant's technician employment in such a way as to deny him the administrative recourse he alleges he would have had if the military had acted directly to terminate this employment.

The Technicians Statute, 32 U.S.C.A. § 709(e)(3) (Supp. 1974), provides that the *adjutant general* may terminate a technician's employment *for cause*:

> (3) a technician may, at any time, be separated from his technician employment for cause by the adjutant general of the jurisdiction concerned.

In order for this provision to have meaning, the unreviewable discretion of Guard officials to permit or refuse re-enlistments must not extend to decisions which are made for the purpose of affecting a guardsman's technician employment. If the concern of the Guard is in the first instance with a guardsman's technician employment, the statute provides that it is the adjutant general, not the commanding officer, who must act, and it provides that he must act for cause. Appellant's "allegations—which we must construe most favorably to the [appellant] at this stage of the

litigation—do raise a genuine issue as to his interest in the continued employment" as a technician with the Tennessee Air National Guard. *Perry v. Sindermann*, 408 U.S. 593, 599 (1972).

The standard for judging the sufficiency of a complaint on a motion to dismiss is a familiar one. "The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims." *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974). The complaint must not be dismissed "unless it appears beyond doubt that plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). We hold that the District Court erred in dismissing the complaint before appellant had an opportunity to prove his allegation that Colonel Akin's decision was made for other than military reasons.

Reversed and remanded.

APPENDIX B

In the United States District Court for the
Eastern District of Tennessee
Northern Division

Billy Don Dunlap,

v.

Colonel Robert W. Akin, et al.

} Civ. 3-74-15.

MEMORANDUM

This action is presently before the Court on defendant's motion to dismiss or, alternatively, motion for summary judgment.

Plaintiff's action arises under 42 U.S.C. § 1983 et seq.; jurisdiction accordingly lies under 28 U.S.C. § 1343.

In his complaint, plaintiff asserts that he was enlisted in the Tennessee Air National Guard, 134th Air Refueling, as an Air Guard technician from August 13, 1967 through January 12, 1973. Plaintiff's term of enlistment with the Air National Guard expired on December 8, 1972. Plaintiff was informed by a Colonel Robert W. Akin, Commander of the 134th Air Refueling Group of the Tennessee National Guard, prior to plaintiff's effective termination date that, in exercising his discretion, he had concluded that it was not in the best interest of the Guard to grant plaintiff's reenlistment. Thereafter, a board of officers was convened by Colonel Akin to further advise him whether plaintiff should be permitted to reenlist. Plaintiff's request to appear before this advisory board was denied. The board, in concurring in Colonel Akin's conclusion, recommended that

plaintiff not be permitted to reenlist. Plaintiff presently contends that he has never received a copy of any of the charges offered against him or any formal declaration from the advisory board advising him why his continued employment with the unit was not in the Guard's best interest.

Pursuant to the recommendation of the board, and the opinion of Colonel Akin, plaintiff received an order on December 8, 1972, discharging him from the Tennessee Air National Guard and as a Reserve of the Air Force. The reason given in the order for such termination was the expiration of plaintiff's term of enlistment.

Shortly thereafter, on December 13, 1972, plaintiff received a letter from Colonel Akin, notifying him that his employment as a technician would be terminated, effective 30 days from the date of receipt of said letter, due to his loss of membership in the Tennessee Air National Guard. This action was taken pursuant to the statutory directive of 32 U.S.C. § 709(e)(1) (Supp. 1973), which provides, in part:

"709(e)(1) * * *

". . . [A] technician who is employed in a position in which National Guard membership is required as a condition of employment and who is separated from the National Guard or ceases to hold the military grade specified for his position by the Secretary concerned shall be promptly separated from his technician employment by the adjutant general of the jurisdiction concerned."[1]

[1] Defendants have responded that the joinder of appropriate federal officials is required as plaintiff's action necessarily addresses itself to Section 709 *et seq.* Plaintiff, however, fails to attack the validity of Section 409 but instead attacks only the discretion or perogative allegedly vested in a commander to decide whether it is in the best interest of the Air National Guard to allow a member to reenlist. Plaintiff's complaint is thus directed only to acts of a member of a state militia, not a federal official.

Pursuant to Section 709(e)(3) (Supp. 1973), plaintiff filed "on or about the 22nd day of January, 1973," an appeal with the state adjutant general.[2] Although plaintiff has not stated what appellate disposition was taken by the adjutant general, it is presumed that an adverse decision was rendered, affirming the action taken by Colonel Akin in denying plaintiff's reenlistment.

Plaintiff's sole allegation is that the discretion vested in the commanding officer to deny reinlistment is necessarily exercised in an arbitrary and capricious manner since such discretion is not couched in sufficiently descriptive standards. Thus, in absence of any definitive guidelines to follow in denying an applicant the opportunity to reenlist, the commanding officer's decision is necessarily arbitrary and capricious.

Although plaintiff requests a jury trial in this action, at this stage in the proceeding it appears that the preliminary question is one of law alone: Can the Court review the actions of a com-

The employment status of a technician with the Guard is an admixture of federal and state characteristics. See generally, *Calhoun* v. *Doster*, 324 F.Supp. 736 (M.D.Ala. 1971). Principally, however the congressional intent was to vest in the State Adjutant General the authority to employ and terminate the services of technicians. 32 U.S.C. § 709(c). Thus, the operative focus of the personnel relationship is between the state and the enlisted man. This congressional intent was reiterated in *Calhoun*, 324 F.Supp. at 739, n. 4:

"This requirement [Section 709(c)—'adjutant generals . . . to employ and administer the technicians'] is intended to achieve two purposes: (a) recognize the State character of the Guard and (b) meet the requirement of giving the adjutant-generals (who are state officers) the statutory function of employing federal employees." 1968 Cong. and Adm. News, p. 3330.

For additional discussion of the state's role, see *Anselmo* v. *Ailes*, 235 F.Supp. 203 (D.C.N.Y. 1964), aff'd 344 F.2d 607 (2nd Cir. 1965).

[2] 32 U.S.C. § 709(e) (5) (Supp. 1973) provides:

"(5) A right to appeal which may exist with respect to clause (1), (2), (3), or (4) shall not extend beyond the adjutant general of the jurisdiction concerned."

manding officer of a state militia in denying a currently enlisted technician his request for reenlistment?

Having examined the law and the facts, it is the considered opinion of the Court that, under the circumstances described here, the actions of Colonel Akin and the advisory board and the subsequent appeal to the adjutant general are not subject to review by a civil court.

Tennessee Code Annotated, Title 7, Section 105 (1973) recognizes that "[t]he governor of this state shall be the commander-in-chief of the military forces," and, in addition to his enumerated powers, *Id.* § 105(a)-(e), is granted "further and general powers . . . as may be necessary."

Likewise, the Air National Guard Regulation 39-10, ¶ 4, provides:

> "4. *Separation Authority*. The authority to separate members from the Air National Guard rests with the State. The authority to separate members from their Reserve of the Air Force enlistments rests with the Secretary of the Air Force, and is delegated to the State adjutant general, as indicated in this regulation, with authority to the commanders of wings, separate groups, or separate squadrons."

Although the Court is not readily aided in its disposition by a plethora of case law, it is guided by traditional principles that govern the civil review of military proceedings. As plaintiff notes, *Baum v. Zuckert*, 342 F.2d 145 (6th Cir. 1955), is not factually analogous to the case at bar since in that case the plaintiff was dismissed from active service in the Air Force "for reasons within his control," and the Court in that instance was reviewing personnel action of the Civil Service Commission. Accordingly, the scope of review for the district court was drawn in sharper focus than the review presently before this Court. *Baum* does evidence, however, the judiciary's historical

reluctance to review administrative actions of the military. This principle of judicial discretion should find no less support where the district court is reviewing the administrative proceedings of a state, rather than a federal, militia. Additionally, it should be noted that in *Baum*, plaintiff's employment was terminated as a result of his reassignment to inactive duty. Here, however, plaintiff was not discharged prior to the end of his enlistment, but merely was denied permission to reenlist. The distinction appears to be more than merely formal, as the scope of review of a discharge of an enlisted man prior to the expiration of his term of enlistment "without honor" would indeed be different from the more routine discharge and denial of reenlistment at the expiration of this term. Since civil review has not been recognized in the former instance, it is difficult to understand effecting such review in the latter instance. See, e.g., *Boling v. Rockefeller*, 277 N.Y.S.2d 168, 52 Misc. 2d 745 (1967). Contrary to the distinction drawn by plaintiff, the discharge or reassignment premised upon misconduct on the part of the enlisted man, such as in the *Baum* case, provides the basis for a potentially stronger appeal to the civil courts.[3]

Historically, the relationship between a sovereign and the enlisted man serving in a militia, when couched in terms of either an implied or express contract for the purposes of judicial perspective, is unlike that of his civilian counterpart, notwithstanding statutory provisions. Accordingly, though set forth in a federal posture, it has been articulated in *Reid v. United States*, 161 F. 469, 472 (S.D.N.Y. 1908).

> "The exact method of this soldier's discharge and the quantum or kind of character that should be given him, not

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[3] In a similar vein, the courts have been restricted to a narrow scope of review in examining disciplinary actions of unit commanders resulting in assignment to active duty in the armed forces. See generally, Gianatasio v. Whyte, 426 F.2d 908 (2nd Cir. 1970); Jolicoeur v. Laird, 344 F.Supp. 1125 (D.C.Minn.), aff'd 462 F.2d 1234 (8th Cir. 1971); Comunale v. Mier, 355 F.Supp. 429 (D.C. Pa. 1973).

being regulated by statute, must necessarily be left in the discretion of the executive officer having power to grant some type of discharge. That it is beyond the power of the judicial branch to coerce or review the discretion of the executive is familiar doctrine."[4]

Again, it is of significance to note that *Reid* addresses itself to the nature of the executive's discretion in discharging the enlisted man prior to the end of reenlistment.

More recently, the Supreme Court tempered the role of the federal court in reviewing administrative proceedings in the United States Army:

> "We know that from top to bottom of the Army the complaint is often made, and sometimes with justification, that there is discrimination, favoritism or other objectionable handling of men. But judges are not given the task of running the army. . . . Orderly government requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as the Army must be scrupulous not to interevene in judicial matters. . . ."
>
> *Orloff v. Willoughby*, 345 U.S. 83, 93 (1953).

As noted above, this principle has found similar application in judicial review of state militia proceedings, since its policy basis is equally controlling on the state level.[5]

Finally, this Court has examined the Supreme Court's rulings in *Board of Regents v. Roth*, 408 U.S. 564 (1972), and *Perry v. Sindermann*, 408 U.S. 593 (1972), for possible application.

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[4] The roots of this doctrine are deep and find their basis in the relation of the British crown to its soldiers. In re Tuffnell, L.R. 3 Ch.Div. 173; see also United States v. Cottingham, 1 Rob. (Va.) 629; United States v. Blakeney, 3 Grat. (Va.) 405; In re Morrissey, 137 U.S. 157, 11 S.Ct. 57, 34 L.Ed. 644 (1890).

[5] See note 3, *supra*.

Any application of those cases is negated by the unique relationship between the state militia and the enlisted man[6] and the fact that generally *Roth* and *Sindermann* have been restricted in application to the university community.

In conclusion, it is the considered opinion of the Court that it is without the power to review the denial of plaintiff's request for reenlistment in the Tennessee Air National Guard, in the absence of extraordinary circumstances.

Accordingly, it is Ordered that defendant's motion be, and the same hereby is, granted.

/s/ Robert Taylor
United States District Judge

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[6] See e.g., *Washington State Nat. Guard v. Washington State Personnel Bd.*, 379 P.2d 1002, 61 Wash.2d 708 (1963).

APPENDIX C

In the United States District Court, Eastern District of Tennessee, Northern Division

Billy Don Dunlap
Plaintiff
v.
Colonel Robert W. Akin, et al.
Defendants
Civil Action No. 3-74-15

MOTION TO DISMISS AND ALTERNATIVE MOTION FOR SUMMARY JUDGMENT

Come now the defendants by and through the Attorney General and the State of Tennessee and move this Honorable Court to dismiss this complaint under the provisions of the Federal Rules of Civil Procedure, Rule 12(b)(6) and (7) for failure to state a claim upon which relief can be granted and for failure to join a party in whose absence complete relief cannot be accorded, pursuant to the provisions of Rule 19; or in the alternative to enter summary judgment for the defendants pursuant to Rule 56(b).

Respectfully submitted

/s/ ALEX B. SHIPLEY, JR.
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Attorney for Defendants

In the United States District Court, Eastern District of Tennessee, Northern Division

Billy Don Dunlap
Plaintiff
v.
Colonel Robert W. Akin, et al.
Defendants
Civil Action No. 3-74-15

MEMORANDUM IN SUPPORT OF MOTION TO DISMISS AND ALTERNATIVE MOTION FOR SUMMARY JUDGMENT

The plaintiff, Billy Don Dunlap, has brought this civil action complaining of termination of employment as a technician with the Tennessee Air National Guard. He has alleged that this termination of employment occurred as a result of the refusal of the defendants to allow him to re-enlist in the Tennessee Air National Guard.

I

The plaintiff has asserted that the refusal of certain officers of the Tennessee Air National Guard to allow his re-enlistment resulted in his discharge from his civil service employment as a technician. His employment was not unlike that involved in the case of *Baum v. Zuckert*, 342 F. 2d 145 (6th Cir. 1955), concerning the Air Force Reserve technician program, in which the Court stated that the program was to provide active Air Force Reserve units

> ". . . which are composed chiefly of personnel who train only a few days each month and two weeks in the summer, with a core of highly trained personnel whose full time

civilian jobs coincide with their military job. This is the reason for the requirement that plaintiff was to maintain his status as an active member of the local Air Force Reserve Training Unit, and that if he failed to do so 'for reasons within his control' he would be considered to have failed to have met a condition of employment, thereby requiring separation from his civilian position." (at page 146).

In that case the plaintiff had previously resorted to his remedies available to him pursuant to his position as a civl service employee. In the case at bar the plaintiff has not alleged that he has exhausted any of the administrative remedies available to him.

Furthermore, in *Baum v. Zuckert*, the Court of Appeals noted that the judicial function was to determine whether there had been substantial compliance with the law and regulations rather than to review the wisdom or good judgment of those exercising discretion under the law and regulations.

II

The plaintiff seeks reinstatement of his employment as a technician with the Tennessee Air National Guard. Under the provisions of 32 U.S.C. §709, the plaintiff was required to be a member of the Tennessee Air National Guard while employed as a technician. Under 32 U.S.C. §709(e)(1) the plaintiff was required to be promptly separated from his technician employment by the Adjutant General of the State of Tennessee when he was separated from the Tennessee Air National Guard.

The actions of the defendant officers of the Tennessee Air National Guard were taken pursuant to regulations prescribed by the Secretary of the Air Force, 32 U.S.C. §709. Thus, his challenge to the regulations under which he was not allowed to re-enlist and regulations under which his employment as a technician was terminated would require the joinder of the Secretary of the Air Force who is empowered by law to prescribe such regulations.

III

In support of the Motion for Summary Judgment, the defendants would show the Court that the complaint arises out of alleged actions of the defendants in improperly refusing to allow the plaintiff to reenlist in the Tennessee Air National Guard. The termination of the plaintiff's employment as a technician came by operation of law; thus the only matter litigable involves the refusal of the defendants to allow the plaintiff to reenlist. According to the complaint, the action occurred prior to 8 December 1972 and the plaintiff was discharged from the Tennessee Air National Guard on 8 December 1972. The complaint was brought 11 January 1974. Under the provisions of T.C.A. §28-304 civil actions for compensatory or punitive damages or both brought under the federal Civil Rights statutes shall be commenced within one year after the cause of action accrued. Thus, the present action is barred by the applicable statute of limitations.

CONCLUSION

Therefore, the defendants would assert that the issue at bar is a military matter concerning the merits of the defendants' refusal to allow the plaintiff to re-enlist which should not be examined by this Court; that the relief sought cannot be accorded without joinder of the Secretary of the Air Force who has prescribed the regulations under which the defendants acted; and that the cause of action arose by plaintiff's discharge from service in the Tennessee Air National Guard on 8 December 1972 and is thus barred by the applicable statute of limitations.

The defendants would urge this Honorable Court to dismiss the complaint under the provisions of F.R.C.P., Rule 12(b)(6) or (7), or both; and in the alternative to grant summary judgment in their favor pursuant to F.R.C.P., Rule 56(b).

Respectfully submitted

/s/ ALEX B. SHIPLEY, JR.
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Attorney for Defendants

APPENDIX D

In the United States District Court for the
Eastern District of Tennessee

Civil Action No. Civ-3-74-15

Billy Don Dunlap

Plaintiff

vs.

State of Tennessee: Winfield Dunn, as Governor of the State of Tennessee and Commander-in-Chief of the National Guard of the State of Tennessee; Tennessee Air National Guard; Tennessee Air National Guard, 134th Air Refueling Group (TAC); Major General William C. Smith, as Adjutant General of the National Guard of the State of Tennessee; Colonel Robert W. Akin, as Commander of the 134th Air Refueling Group; Lieutenant Colonel David L. Carter, as Commander of the 134th Combat Support Squadron; Lieutenant Colonel Bob Arr, as Commander of the 151st Air Refueling Squadron; Lieutenant Colonel William D. Asbury, as Commander of the 134th Supply Squadron; Lieutenant Colonel Thomas P. Webb III, as Commander of the 134th Camron Squadron; and Lieutenant Colonel Marshall C. Pierce, as 134th Director of Operations

Defendants

COMPLAINT

Comes now the plaintiff, Billy Don Dunlap, and would respectfully show unto this Honorable Court that:

1. This is an action brought to redress the deprivation, under color of state statutes, ordinances, regulations, customs or usages of and pertaining to the Air National Guard of the State of Tennessee, of certain rights, privileges and immunities secured to the plaintiff by the due process and equal protection clauses of the Fourteenth Amendment of the Constitution of the United States and Title 42, United States Code, Sections 1983, 1985(3) and 1986. This suit also seeks a judgment declaring the discretion or prerogative allegedly vested in a commander to reenlist or not reenlist a member in the Air National Guard and to decide what is in the best interest of the Air National Guard, as it was used against the plaintiff in the instant case, to be unconstitutional and for an injunction prohibiting the deprivation of the plaintiff's rights, privileges and immunities, by the defendants, through the use of said alleged discretion or prerogative vested in his commander. Jurisdiction of this Court is invoked pursuant to the provisions of Title 28 of the United States Code.

2. The matter in controversy exceeds in monetary value the sum of $10,000.00, exclusive of interest and costs.

3. The plaintiff is a citizen and resident of the State of Tennessee, and was employed by the Tennessee Air National Guard, 134th Air Refueling Group, as an Air Guard technician, Job No. 81-13, from the 13th day of August, 1967, through the 12th day of January, 1973.

4. The defendants are the State of Tennessee; Winfield Dunn, Governor of the State of Tennessee and Commander-in-Chief of the National Guard of the State of Tennessee; the Tennessee Air National Guard; the Tennessee Air National Guard, 134th Air Refueling Group; Major General William C. Smith, Adjutant General of the National Guard of the State of Tennessee; Colonel Robert W. Akin, Commander of the 134th Air Refueling Group of the Tennessee Air National Guard; Lieutenant Colonel David L. Carter, Commander of the 134th Combat Support Squadron; Lieutenant Colonel Bob Arr, Commander of the 151st Air Refueling Squadron; Lieutenant Colonel William D. Asbury, Commander of the 134th Supply Squadron; Lieutenant Colonel Thomas P. Webb III, Commander of the 134th Camron Squadron; and Lieutenant Colonel Marshall C. Pierce, 134th Director of Operations.

5. The Tennessee Air National Guard exists pursuant to the laws of the State of Tennessee, as a governmental agency of the State of Tennessee.

6. The individual defendants are now and were at all times material hereto duly elected, qualified, acting, appointed or employed members of the Tennessee Air National Guard of the State of Tennessee and as such have and had under their control all or part of the general operation and supervision of said Air National Guard. Said defendants have and had the further power and authority to enforce and make use of the rules and regulations prescribed for the operation and conduct of said Air National Guard. The individual defendants are agents, servants and employees of the State of Tennessee in the enforcement of all said rules and regulations.

7. The action of which the plaintiff now complains was the termination of his employment, on the 12th day of January, 1973, as a technician with the Tennessee Air National Guard, which action, although taken by some of the individual defendants under "color of law," constituted a violation of the plaintiff's rights, privileges and immunities as granted under the Fourteenth Amendment of the Constitution of the United States and Title 42, United States Code, Sections 1983, 1985 (3) and 1986.

8. The rules and regulations require that as a condition of employment as a technician by the Tennessee Air National Guard, that the technician is required to be a federally recognized member of the Tennessee Air National Guard.

9. The plaintiff was a federally recognized member of the Tennessee Air National Guard from the date of his initial employment by it as a technician until the 8th day of December, 1972, on which date his last term of enlistment expired.

10. Prior to December 8, 1972, the plaintiff attempted to effectuate his reenlistment in the Tennessee Air National Guard by contacting the appropriate officials. However, the plaintiff was informed that his commander, the defendant, Robert W. Akin in the exercise of his alleged discretion or prerogative, had decided that it was not in the best interest of the Tennessee Air National Guard to allow him to reenlist. Thereafter, the plaintiff continued in his efforts to reenlist and was informed that the defendant, Robert W. Akin, had decided to convene a board comprised of the defendants, David L. Carter, Bob Arr, William D. Asbury, Thomas P. Webb III and Marshall C. Pierce, to advise him as to whether or not the plaintiff should be allowed to reenlist. The plaintiff requested that he be allowed to appear before said board, for the purpose of attempting to receive a fair and impartial hearing, but his request was denied. The board recommended that it was not in the best interest of the Tennessee Air National Guard to allow the plaintiff to reenlist. The plaintiff requested, but was never furnished, the reason why it was considered not to be in the best interest of the Tennessee Air National Guard to allow him to reenlist. The plaintiff was never supplied a copy of any charges or statements made against him when the board was convened, although he requested the same.

11. On December 8, 1972, an order was issued discharging the plaintiff from the Tennessee Air National Guard and as a Reserve of the Air Force. The reason stated, in the order, for the plaintiff's discharge was the expiration of his term of service.

12. On December 13, 1972, the plaintiff received a letter from the defendant, Robert W. Akin, notifying him that his employment as a technician would be terminated, effective 30

days from the date of receipt of said letter, due to his loss of military membership in the Tennessee Air National Guard.

13. The discretion or prerogative allegedly vested in the commander-defendant, Robert W. Akin, to decide whether or not it is in the best interest of the Air National Guard to allow a member to reenlist, as it was used in this case, constitutes a denial of the plaintiff's right to due process of law inasmuch as it is vague and lacks any objective or ascertainable standards or criteria to guide the commander in his decision as to what is in the best interest of the Air National Guard and by which a commander's decision may be gauged.

14. The action taken by the defendant, Robert W. Akin, under color of authority, was purposeful and intentional action that was calculated to culminate in the plaintiff's discharge from his technician's job and have the further result of placing the plaintiff in such a position as would either frustrate or deny any opportunity for him to effectively pursue an administrative remedy.

15. The action taken by the defendant, Robert W. Akin, was arbitrary, capricious, unreasonable, amounted to an abuse or misuse of his allegedly vested discretion or prerogative, was discriminatory in nature and thereby resulted in a deprivation of certain rights, privileges and immunities secured to the plaintiff by the Fourteenth Amendment to the Constitution of the United States and Title 42, United States Code, Sections 1983, 1985(3) and 1986.

16. The action taken by the board and the members thereof was a continuing and further effort to eliminate the plaintiff from his position as a technician and to frustrate or deny any opportunity for him to effectively pursue an administrative remedy. The action taken was arbitrary, capricious, unreasonable and discriminatory in nature and thereby deprived the plaintiff of certain rights, privileges and immunities secured to him

by the Fourteenth Amendment of the Constitution of the United States and Title 42, United States Code, Sections 1983, 1985(3) and 1986.

Wherefore, plaintiff demands a jury to try the issues when joined and demands judgment as follows:

(1) That this Honorable Court assume jurisdiction in this matter.

(2) That proper process issue and be served upon each of the said defendants, herein named, requiring them to appear and answer this complaint.

(3) That the plaintiff be reinstated in his former employment position, as a technician, or the equivalent thereof, with the Tennessee Air National Guard, 134th Air Refueling Group.

(4) That the plaintiff be reinstated and allowed to reenlist as a federally recognized member of the Tennessee Air National Guard, in his former position therein or the equivalent thereof, with the Tennessee Air National Guard, 134th Air Refueling Group.

(5) For a sum of money equal to plaintiff's full back pay, including regular periodic increases allotted to his position, as a technician, from the date of termination of employment to the date when he is reinstated, minus his interim earnings.

(6) For a judgment declaring the discretion or prerogative allegedly vested in a commander, to decide whether or not it is in the best interest of the Air National Guard to allow a member to reenlist, to be so vague and lacking in objective or ascertainable standards or criteria to guide or gauge the commander's decision as to be unconstitutional and thereby to have constituted a deprivation of the plaintiff's right to due process.

(7) For an injunction enjoining the defendants, their agents, employees, servants and all others acting in concert therewith from pursuing any action against the plaintiff which would be discriminatory in nature or constitute a deprivation of his rights, privileges or immunities.

(8) For costs and such other, further and general relief as the Court shall deem proper.

17. Plaintiff now and hereby incorporates herein all of the allegations set forth in Paragraphs 1 through 16 above.

18. The acts of the defendants, Robert W. Akin, David L. Carter, Bob Arr, William D. Asbury, Thomas P. Webb III and Marshall C. Pierce, set forth in Paragraphs 7, 10, 12, 14, 15, and 16 above, were done willfully with the intent and purpose of depriving the plaintiff of his rights, privileges and immunities secured to him by the Fourteenth Amendment to the Constitution of the United States and Title 42, United States Code, Sections 1983, 1985(3) and 1986 and further depriving him of his employment as a technician.

Wherefore, plaintiff demands a jury to try the issues when joined and demands judgment as follows:

(1) That this Honorable Court assume jurisdiction in this matter.

(2) That proper process issue and be served upon each of the said defendants, herein named, requiring them to appear and answer this complaint.

(3) For Judgment for damages in an amount deemed just and proper but in no event to exceed an aggregate amount of One Hundred Thousand ($100,000.00) Dollars, against each, any or all of the defendants.

(4) For costs and such other, further and general relief as the Court shall deem proper.

/s/ BILLY D. DUNLAP

/s/ WILLIAM TERRY DENTON
Attorney for the Plaintiff
P. O. Box 505
Maryville, Tennessee 37801

Certificate

I, William Terry Denton, Attorney for the Plaintiff, hereby certify the foregoing to be a true and exact copy of the original complaint filed in this cause on this the 11th day of January, 1974.

/s/ WILLIAM TERRY DENTON